84-43

No. ——

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THE GOOD SAMARITAN HOSPITAL OF MARYLAND, INC.,
Appellant,

v.

THE STATE OF MARYLAND,
ADELE WILZACK, SECRETARY OF THE MARYLAND
DEPARTMENT OF HEALTH AND MENTAL HYGIENE,
MARYLAND PODIATRY ASSOCIATION,
AND ANTHONY J. COSTA,
Respondents.

On Appeal from the Court of Appeals of the State of Maryland

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether Maryland Health-General Code Ann. § 19-351(b) (1982), which requires all hospitals in the State of Maryland to amend their bylaws so as to grant medical staff privileges to podiatrists, violates the Contract Clause of the United States Constitution, as applied to The Good Samaritan Hospital of Maryland, Inc., by unconstitutionally changing the Hospital's corporate charter.

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JURISDICTIONAL STATEMENT

The Good Samaritan Hospital of Maryland, Inc. ("Good Samaritan"), appeals from a judgment of the Maryland Court of Appeals reversing a decision of the Circuit Court for Baltimore City and holding that Maryland Health-General Code Ann. § 19-351(b) (1982) did not violate the Contract Clause of the United States Constitution as applied to Good Samaritan.

OPINION BELOW

The opinion of the Maryland Court of Appeals is reported at 473 A.2d 892 (1984). The opinion of the Circuit Court for Baltimore City is unreported. Both opinions are printed in the Appendix to the Jurisdictional Statement.

JURISDICTION

On July 24, 1980, Good Samaritan filed a complaint in the Circuit Court for Baltimore City, seeking a declaratory judgment that Maryland Health-General Code Ann. § 19-351(b) (1982) violated the Contract Clause of the United States Constitution as applied to Good Samaritan. On February 3, 1983, the Circuit Court for Baltimore City rendered a declaratory judgment that § 19-351(b) violated the Contract Clause. On April 11, 1984, the Maryland Court of Appeals vacated the judgment of the Circuit Court, holding that the statute did not violate the Contract Clause.[1] Notice of appeal was filed in the Maryland Court of Appeals on June 25, 1984. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article I, § 10

"No State shall . . . pass any . . . Law impairing the Obligation of Contracts. . . ."

Maryland Health-General Code Ann. § 19-351(b) (1982)

"(b) *Podiatrists.*—(1) A hospital or related institution that provides medical or surgical care of the foot,

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[1] The Maryland Court of Appeals also held that the statute did not violate the federal or state equal protection clauses and that it did not constitute a "special law" in violation of the Maryland Constitution. Those holdings are not at issue on this appeal.

other than incidental care, shall include, in its bylaws, rules, or regulations, provisions for use of facilities by and staff privileges for qualified podiatrists.

"(2) The hospital or related institution may restrict use of facilities and staff privileges by podiatrists to those podiatrists who meet the qualifications that the hospital or related institution sets for granting those privileges."

STATEMENT OF THE CASE

Good Samaritan was established under the will of Thomas O'Neill, who died in 1919 and left one-third of his estate for the construction and operation of a private Catholic hospital in Baltimore. On February 10, 1920, the State of Maryland granted Good Samaritan a corporate charter to operate a charitable hospital. Under the terms of the charter and the state's corporation law, authority to manage the hospital was vested in the corporation's Board of Trustees. A hospital building was constructed and opened to the public in November 1968. Among the services provided by Good Samaritan are certain types of medical and surgical care for the foot.

In 1979, with the enthusiastic support of Maryland podiatrists, the Maryland Legislature enacted the statute challenged herein. As interpreted by the state courts, this law compels all hospitals in the State of Maryland to amend their bylaws so as to permit podiatrists to obtain staff privileges.[2] On July 24, 1980, after receiving a letter from a podiatrist requesting staff privileges, Good Samaritan filed a complaint seeking a declaratory judgment that § 19-351(b) was unconstitutional under the

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[2] The state court defined staff privileges as "the authority granted to a physician or other medical professional by a hospital board of trustees to admit inpatients and to utilize hospital facilities." 473 A.2d at 894 n.1. (App. 3a n.1).

federal and state constitutions.[3] The complaint specifically alleged, *inter alia*, that the statute "is unconstitutional or, in the alternative, is unconstitutional as applied to [Good Samaritan] . . . for the reason that it (a) violates Article I, Section 10 of the United States Constitution which prohibits any state from impairing the obligation of contracts . . . ." (E. 118).[4]

Uncontested evidence at the trial established that, prior to the passage of § 19-351(b), 14 hospitals out of 48 in the State of Maryland, including five in the City of Baltimore, granted full staff privileges to podiatrists, and that any podiatrist who wished could therefore obtain full staff privileges at a hospital within the state. The Board of Trustees of Good Samaritan, however, had determined to give podiatrists only limited privileges. Thus, podiatrists were not allowed either to admit patients to Good Samaritan on their own authority or to perform most kinds of surgery there. They could, however, provide outpatient podiatric care.

The record also shows why Good Samaritan chose not to grant staff privileges to podiatrists. Good Samaritan is not a full-service community hospital, but limits its services to certain areas of medical care. For example, it has chosen to provide no pediatric or obstetrical services at all. In those areas in which it specializes, Good Samaritan performs not only patient care but also substantial educational functions. It is affiliated with the

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[3] The complaint named as defendants the State of Maryland, the Secretary of the Maryland Department of Health and Mental Hygiene, and the Maryland Podiatry Association. Anthony J. Costa, the podiatrist who had sought full staff privileges, was granted permission to intervene as a defendant.

Various other hospitals filed briefs as *amicus curiae* in support of Good Samaritan in the trial court, as did the Medical and Chirurgical Faculty of Maryland, a medical association, on appeal.

[4] "E." refers to the joint record extract filed by the parties in the Maryland Court of Appeals.

Johns Hopkins University and the University of Maryland, training students from the medical schools of both universities. Moreover, a substantial amount of research is done at Good Samaritan. Finally, the limited facilities at Good Samaritan are already overtaxed. Patients often have to be discharged to make room for other patients requiring immediate surgery, and the operating rooms themselves are booked far in advance. Thus, the Board of Trustees determined not to overburden the hospital's facilities further, or to change its unique nature, by adding a whole new category of health care practitioners entitled to admit patients and perform surgery. Rather, the Board chose to continue the limited and specialized functions performed by the hospital.

The Chief Judge of the Circuit Court for Baltimore City found that the podiatrist statute violated the Contract Clause of the United States Constitution and declared it unconstitutional. (App. 20a-33a). The court first took note of the state's concession that Good Samaritan's corporate charter was a contract with the state. *See Trustees of Dartmouth College* v. *Woodward*, 17 U.S. (4 Wheat.) 518 (1819). The court found that § 19-351(b) materially changed the terms of that contract by interfering with the hospital corporation's well-established right to manage its internal affairs and to select its own staff. Finally, the court found that the impairment of the contract could not be justified by the exercise of the state's police power, and accordingly declared the statute unconstitutional.

On appeal[5] the Maryland Court of Appeals vacated the judgment of the Circuit Court, ruling that, although

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[5] The appeal was taken to the Maryland Court of Special Appeals, an intermediate appellate court, but, pursuant to Md. Cts. & Jud. Proc. Code Ann. § 12-201 (1984), the Maryland Court of Appeals—the state's highest court—granted certiorari before consideration of the case by the Court of Special Appeals.

Good Samaritan's charter was a contract with the State of Maryland, that contract was not unconstitutionally impaired by § 19-351(b). The court based its ruling upon its interpretation of "Article I, § 10 of the United States Constitution." 473 A.2d at 894. (App. 2a).

REASONS FOR PLENARY CONSIDERATION

In several recent decisions, this Court has reaffirmed the important role played by the Contract Clause in protecting the rights and expectations of contracting parties from arbitrary action by the state.[6] These decisions have sharply distinguished between state laws that affect contracts between private parties and a state's attempts to modify its own contractual obligations. While a court reviewing a state statute that affects obligations under private contracts must defer to legislative determinations of reasonableness, a "more stringent examination" is required when a state attempts to change its own contracts. *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234, 244 n.15 (1978); *see United States Trust Co.* v. *New Jersey*, 431 U.S. 1 (1977). Thus, a statute that changes a contract to which the state is a party cannot be sustained unless the court carefully scrutinizes both the legislation and its purported justification and determines that the impairment of contract is both "reasonable and necessary to serve an important public purpose." *Compare United States Trust Co.* v. *New Jersey*, *supra*, 431 U.S. at 25-26, 29-31, *with Energy Reserves Group, Inc.* v. *Kansas Power & Light Co.*, 103 S. Ct. 697, 705-06 (1983).

The decision of the Maryland Court of Appeals upholding § 19-351(b) failed to heed the teachings of this Court. The court below did not recognize the need for

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[6] *Exxon Corp.* v. *Eagerton*, 103 S. Ct. 2296 (1983); *Energy Reserves Group, Inc.* v. *Kansas Power & Light Co.*, 103 S. Ct. 697 (1983); *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234 (1978); *United States Trust Co.* v. *New Jersey*, 431 U.S. 1 (1977).

heightened scrutiny of laws modifying a state's own contracts, and thus did not give the podiatrist statute the "more stringent examination" required. On the contrary, the Court of Appeals erroneously stated that the same legal test "applies regardless of whether the rights in question are between individuals, between an individual and a state or between a corporation chartered by a state and the chartering state."[7] 473 A.2d at 897. (App. 7a). Only by ignoring the appropriate standard of review was the court able to uphold § 19-351(b).

The failure of the Maryland Court of Appeals to apply the proper standard is apparent from the manner in which it erroneously concluded that § 19-351(b) did not change any contractual obligation. There is no dispute that Good Samaritan's charter constitutes a contract with the State of Maryland. As the Maryland court noted, this contract incorporated the relevant provisions of state law. 473 A.2d at 897. (App. 8a-9a). *See also United States Trust Co. v. New Jersey, supra,* 431 U.S. at 26-27 n.26 (terms of contract can be "implied from the statutory scheme"). Thus, under the contract between Maryland and Good Samaritan, the hospital's Board of Trustees had full authority to manage the affairs of the hospital, as provided for in Thomas O'Neill's will, and to pass all appropriate bylaws for that purpose. *See* Md. Corps. & Ass'ns Code Ann. § 2-103(15) (1975). In particular, the state granted Good Samaritan the right to choose those to whom it would grant staff privileges. "It has never been the policy of the State of Maryland to interfere with the power of the governing

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[7] Similarly, in setting forth what it believed to be the proper standard of review, the Court of Appeals quoted passages from this Court's decisions in *Allied Structural Steel Co.* v. *Spannaus, supra,* and *United States Trust Co.* v. *New Jersey, supra,* which related to private contracts. The court failed to discuss the holdings of those cases relating to the need for stricter scrutiny of a state's attempts to change contracts to which it is a party. 473 A.2d at 897. (App. 7a-8a).

body of a private hospital to select its own medical staff." *Levin* v. *Sinai Hospital of Baltimore City*, 186 Md. 174, 180, 46 A.2d 298, 301 (1946).[8] *Cf. Jefferson Parish Hosp. Dist. No. 2* v. *Hyde*, 104 S. Ct. 1551, 1568 (1984) (acknowledging hospital's "unquestioned right to exercise some control over the identity and the number of doctors to whom it accords staff privileges").

The newly enacted podiatrist statute severely changed this contract. No longer did the Board of Trustees have exclusive authority to enact appropriate bylaws to run the hospital or to "select its own medical staff" based upon the hospital's needs and the services it provides. Rather, the state legislature, directly overriding the authority granted under the state's contract with Good Samaritan, rewrote the hospital's bylaws and dictated that podiatrists be given staff privileges. By destroying Good Samaritan's reasonable expectations under the charter and abruptly limiting the authority of the Board of Trustees, Maryland has impaired its contract with Good Samaritan. *Energy Reserves Group, Inc.* v. *Kansas Power & Light Co., supra*, 103 S. Ct. at 708.

The Maryland Court of Appeals, however, believed that the state retained the power to modify or alter corporate charters without violating the Contract Clause unless the change "would destroy or fundamentally change the corporation's purpose." 473 A.2d at 898 & n.5. (App. 9a & n.5). This conclusion was simply erroneous; it reflects the court's failure to subject the state's action to the strict scrutiny required by this Court. Contrary to the apparent belief of the Court of Appeals, this Court has squarely held that "total destruction" of contractual obligations is not required before a statute will be found to violate the Contract Clause. *United States Trust Co.* v.

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[8] Long before the passage of the podiatrist statute, Maryland law expressly provided that a hospital had "the right . . . to employ its own personnel and staff." Md. Code Ann. Art. 43, § 562 (1957).

New Jersey, supra, 431 U.S. at 26-27. On the contrary, when the state is a party to the contract, no more than "a technical impairment" need be found to call for strict judicial scrutiny. *Id.* at 21. Since the podiatrist statute changed the powers granted to the hospital's trustees under the state's contract with Good Samaritan, it worked —at the least—the sort of "technical impairment" requiring stringent examination under the Contract Clause.

In evaluating the justifications proffered by the state for the podiatrist statute, the Court of Appeals again failed to apply the appropriate standard of review. Rather than conduct the sort of stringent examination of necessity and reasonableness mandated by this Court, the court below felt its function in reviewing the statute was "very limited," and that the statute could be sustained if it had any "rational basis." 473 A.2d at 899, 901. (App. 13a, 15a).[9] When the proper standard of review is applied, it is plain that § 19-351(b) was neither necessary nor reasonable.

There surely was no need for the statute. On the one hand, even prior to the enactment of § 19-351(b), almost one-third of the hospitals in Maryland granted full staff privileges to podiatrists, and the president of the Maryland Podiatry Association, who testified as a witness on behalf of the appellees in the trial court, admitted that any podiatrist who wished to obtain full staff privileges at a hospital in Maryland was able to do so. (E. 100-01). On the other hand, full staff privileges for podiatrists at Good Samaritan were not required for adequate patient care. There was no claim made that the medical care of the foot provided at Good Samaritan Hospital was inadequate, and the record established the contrary.

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[9] The Court of Appeals discussed the justifications for the statute in the course of rejecting Good Samaritan's claim that § 19-351(b) denied it due process of law and equal protection of the laws, contentions not raised on this appeal.

(E. 72-73). Thus, the statute cannot be considered "necessary" for any important public purpose.

Nor was the statute "reasonable." It was not enacted to protect society at large from an emergency situation, such as the Great Depression, *see, e.g., Home Building & Loan Ass'n* v. *Blaisdell*, 290 U.S. 398 (1934), but for the convenience of a particular special interest group—the 150 to 200 podiatrists practicing in Maryland. *See Allied Structural Steel Co.* v. *Spannaus*, *supra*, 438 U.S. at 247-49; *Treigle* v. *Acme Homestead Ass'n*, 297 U.S. 189, 197-98 (1936). Moreover, compliance with the statute would impose heavy burdens upon Good Samaritan. The hospital's facilities are fully utilized. The compelled grant of staff privileges to podiatrists, enabling them to admit patients and perform surgery, would overburden the hospital's facilities. To accommodate podiatrists would require the construction of new operating rooms and other facilities, as well as the hiring of more support personnel such as nurses and anesthesiologists—an expansion of the hospital which might not be feasible either financially or legally. (E. 16-17, 20-21, 27-30). Indeed, the Court of Appeals appeared to concede as much. 473 A.2d at 895. (App. 4a-5a).

In addition to the direct financial impact on Good Samaritan, the statute, in effect, dictates how Good Samaritan is to provide medical care. Exercising the rights granted it by the corporate charter, Good Samaritan has chosen to provide medical care only in certain areas to carry out the terms of Thomas O'Neill's bequest. The Maryland court's niggardly interpretation of the protections afforded the corporate charter under the Contract Clause, however, would permit the state legislature, by other statutes, to interfere with these decisions and, for example, require Good Samaritan to provide pediatric care, to perform abortions, or to give up its present orthopedic service, against the wishes of the Board of Trustees. The court's decision could also interfere with

the valuable educational function Good Samaritan performs as a teaching hospital, by requiring Good Samaritan to limit the number of medical doctors to whom it grants staff privileges so as to permit podiatrists full privileges without incurring the expense of expansion. And the decision requires the hospital, which is legally and financially responsible for the quality of medical care provided, to bear potential financial liability for a class of practitioners it does not wish to accept.[10] If the hospital is responsible for the quality of care, it must have the right to choose those who will provide that care to the patient, as was recognized in Maryland's contract with Good Samaritan.

Nor are the effects of the decision of the Maryland court limited to hospitals. Under its holding, a wide variety of chartered philanthropic and educational institutions might find their internal affairs managed in the minutest detail by legislative fiat, contrary to the terms of their charters. The expectations not only of Thomas O'Neill, the benefactor of Good Samaritan, but of other founders of private charitable organizations would thus be retroactively frustrated. Surely, "if the Contract Clause means anything at all," *Allied Structural Steel Co.* v. *Spannaus*, *supra*, 438 U.S. at 250-51, it means that the state cannot engage in such modification of corporate charters for the benefit of small pressure groups. By failing to give the appropriately careful scrutiny to Maryland's attempt to modify its contract with Good Samaritan, the Maryland Court of Appeals has weakened the protection from such state behavior that this Court has held is afforded by the Contract Clause.

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[10] The training of podiatrists is significantly less extensive than that of medical doctors, yet the statute apparently prohibits Good Samaritan from relying upon this lesser training as a basis for denying staff privileges to podiatrists. (E. 23-24, 90-93, 138-42).

CONCLUSION

For all of the above reasons, the judgment of the Maryland Court of Appeals presents substantial questions arising under the Contract Clause of the United States Constitution. This Court should note probable jurisdiction and set the case for plenary consideration or, in the alternative, summarily reverse the judgment of the Maryland Court of Appeals.

Respectfully submitted,

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APPENDIX

IN THE COURT OF APPEALS OF MARYLAND

September Term, 1983

No. 100

STATE OF MARYLAND, *et al.*

v.

THE GOOD SAMARITAN HOSPITAL OF MARYLAND, INC.

MURPHY, C.J.
ELDRIDGE
COLE
DAVIDSON
RODOWSKY
COUCH
MENCHINE, W. ALBERT
(retired, specially
assigned),
JJ.

Opinion by Murphy, C.J.

Filed: April 11, 1984

The primary question in this case is whether Maryland Code (1982), § 19-351(b) of the Health-General Article (the podiatry statute), as applied to The Good Samaritan Hospital of Maryland, Inc. (Good Samaritan), violates Article I, § 10 of the United States Constitution which prohibits any state from enacting "any . . . Law impairing the Obligation of Contracts."

Section 19-351(b) provides:

> "(b) *Podiatrists.*—(1) A hospital or related institution that provides medical or surgical care of the foot, other than incidental care, shall include, in its bylaws, rules, or regulations, provisions for use of facilities by and staff privileges for qualified podiatrists.
>
> (2) The hospital or related institution may restrict use of facilities and staff privileges by podiatrists to those podiatrists who meet the qualifications that the hospital or related institution sets for granting those privileges."

The podiatry statute thus requires that any hospital which offers medical or surgical foot care must permit qualified podiatrists to obtain staff privileges and to use the hospital's facilities. While the statute prohibits such hospitals from categorically excluding all podiatrists, it permits the hospital to determine those individuals whom it will accept as "qualified podiatrists." [1]

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[1] Code (1981), § 15-101(f) of the Health Occupations Article states that to "[p]ractice podiatry means to diagnose or surgically, medically, or mechanically treat any ailment of the human foot." Specifically excluded from the statutory definition of podiatry are arthrodesis (surgical fusion) of two or more tarsal (instep) bones, complete tarsal osteotomy (bone cutting), or administration of an anesthetic, other than a local anesthetic.

A podiatrist is an individual who has received a Doctor of Podiatric Medicine degree (D.P.M.) and is currently fully licensed to practice podiatry. Joint Commission on Accreditation of Hospitals, *Accreditation Manual for Hospitals*, 209 (1982). Qualifica-

I.

Good Samaritan filed a declaratory judgment action in the Circuit Court for Baltimore City, challenging the constitutionality of the podiatry statute as being in violation of (1) the Contract Clause of the Federal Constitution, (2) the Due Process and Equal Protection Clauses of the Fourteenth Amendment and Article 24 of the Maryland Declaration of Rights and (3) § 33 of Article III of the Constitution of Maryland.[2]

The evidence at trial established that Good Samaritan is a private, nonprofit community hospital built and operated pursuant to a testamentary bequest of Thomas O'Neill, a Catholic philanthropist, who died in 1919. O'Neill's will provided for the establishment of a corporation to use his bequest "for the purposes of erecting and maintaining a hospital" in a designated location. It also directed that "the policy, supervision and general direction and management of [the] hospital is at all times to be subject to the control of the . . . Board of Trustees." In 1920, the State granted Good Samaritan a corporate charter pursuant to the general corporation law; the charter enumerated, as the hospital's corporate purpose, "the acquiring of land and . . . other property and erecting and maintaining a hospital."

As shown by the evidence, Good Samaritan is a 259-bed hospital constructed in 1967-1968. It has a medical

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tions for licensure as a podiatrist in Maryland are set forth in Code (1981), § 15-302 of the Health Occupations Article.

The term "staff privileges" generally refers to the authority granted to a physician or other medical professional by a hospital board of trustees to admit inpatients and to utilize hospital facilities. *See* D. J. Tennenhouse, *Attorneys Medical Deskbook 2d* 118 (1983); *Stedman's Medical Dictionary* 1325 (24th ed. 1982).

[2] Section 33 provides, in pertinent part: "[T]he General Assembly shall pass no special Law, for any case, for which provision has been made, by an existing General Law."

staff of 375 health care professionals. Among its many services, the hospital renders medical and surgical care of the foot through general, vascular and orthopedic surgeons. Of these physicians, five are hospital-based orthopedic specialists and thirty-five provide medical care and treatment related to the foot. These physicians hold full staff privileges at the hospital.

The evidence further showed that there are 150 to 200 podiatrists in Maryland. While a number of hospitals in the State grant full staff privileges to podiatrists, Good Samaritan grants only limited out-patient staff privileges to these individuals. Good Samaritan declined to amend its bylaws to conform to the podiatry statute's requirements. The Vice-Chairman of Good Samaritan's Board of Trustees testified as to the reasons for the Board's decision:

> "[T]he board of trustees . . . felt that since we had a charter from the State to act as a medical care institution we had the right to in our own bylaws . . . talk about the kind of care and how we would deliver it. Our hospital is a very busy institution. We didn't feel that the facilities there were capable of taking on other services without infringing upon those that were already established. We felt that the State was intruding in the board room, that we have an intrinsic right to have our hospital deliver the care in the manner that it does and in the areas that it does and so the board voted against changing the bylaws to allow podiatrists to have full medical privileges on the staff."

Other evidence adduced on behalf of Good Samaritan tended to establish that foot care at the hospital, as presently provided by physicians holding staff privileges, was entirely adequate; that podiatrists are, therefore, not needed to provide foot care at Good Samaritan; that the hospital's surgical facilities are presently scheduled to capacity, with a substantial waiting period for elective

surgery; that the addition of podiatrists to Good Samaritan's staff would require more ancillary personnel and more operating rooms, as well as an enlargement of the hospital's present building; and that Good Samaritan could not increase its foot care facilities without infringing upon current hospital services and overtaxing its resources.

The trial court (Grady, J.) concluded that the podiatry statute constituted an impermissible use of the State's police power in violation of the Contract Clause of the Federal Constitution, resulting in an unconstitutional taking of the use of the hospital's property. The court correctly noted that under *Robert T. Foley Co. v. W.S.S.C.*, 283 Md. 140, 389 A.2d 350 (1978), a claim that a legislative enactment invalidly impairs contractual obligations implicates a three-pronged test—first, whether a contract exists; second, whether an obligation under the contract was changed; and third, if it was, whether the change unconstitutionally impairs the contractual obligation. Applying the *Foley* test, the trial court first held that Good Samaritan's charter constituted a contract with the State. In next considering whether the podiatry statute changed an obligation under the contract, the court, relying upon *Levin v. Sinai Hosp. of Balto.*, 186 Md. 174, 46 A.2d 298 (1946), said that a private, nonprofit hospital has "the basic right . . . to manage its internal affairs with particular reference to selecting its staff." The court, after noting that a right of management and control of corporate assets is vested in the corporation as one of the incidents of ownership, determined that the requirements of the podiatry statute "materially affect the Hospital's right to manage its affairs," thus satisfying the second prong of the *Foley* test. The court next considered *Foley's* final prong, *i.e.*, whether the podiatry statute "unconstitutionally impairs the contract obligation." In holding that it did, the court said that the podiatry statute was not predicated upon the abatement of a nuisance or upon an immediate threat to public

health and safety. It therefore concluded that because the statute affirmatively required Good Samaritan to spend its resources *pro bono publico*, an unconstitutional taking of the use of the hospital's property had occurred, thereby impairing the contract obligation, even though Good Samaritan was not deprived of the substantial enjoyment of its property.

The State and other parties defendant in the case appealed to the Court of Special Appeals from the declaratory judgment entered by the trial court.[3] We granted certiorari prior to consideration of the appeal by the intermediate appellate court to consider the issues of public importance raised in the case.

II.

Read literally, the Contract Clause appears to proscribe any impairment. The Supreme Court has made clear, however, that the constitutional prohibition is not absolute. Finding technical impairment is just a first step toward resolving the more difficult question of whether the impairment is permitted by the Constitution. *See, e.g., Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 98 S. Ct. 2716, 57 L. Ed.2d 727 (1978); *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 97 S. Ct. 1505, 52 L. Ed.2d 92 (1977); *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 54 S. Ct. 231, 78 L. Ed. 413 (1934).

It is well settled that the Contract Clause must be accommodated to the inherent police power of a sovereign

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[3] In addition to the State, the Secretary of the Department of Health and Mental Hygiene and the Maryland Podiatry Association were named defendants. Anthony J. Costa, a podiatrist who held limited privileges but was denied full privileges at Good Samaritan, intervened as a co-respondent. Dr. Costa's grant of staff privileges entitled him to treat his patients in Good Samaritan's outpatient department, but he was not authorized to admit inpatients or to perform invasive surgery at the hospital.

state to protect the general welfare of its people. *Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, 459 U.S. 400, 103 S. Ct. 697, 74 L. Ed.2d 569 (1983); *East New York Sav. Bank v. Hahn*, 326 U.S. 230, 66 S. Ct. 69, 90 L. Ed. 34 (1945); *Edgar A. Levy Leasing Co. v. Siegel*, 258 U.S. 242, 42 S. Ct. 289, 66 L. Ed. 595 (1922). "The legislature cannot bargain away the police power of a State." *Stone v. Mississippi*, 101 U.S. 814, 817, 25 L. Ed. 1079 (1880). Accordingly, a reservation of that power is "an implied condition of every contract." *East New York Sav. Bank, supra*, 326 U.S. at 232.

The doctrine that a state's police power is paramount to contract rights applies regardless of whether the rights in question are between individuals, between an individual and a state or between a corporation chartered by a state and the chartering state. The Supreme Court established very early that a state charter is a contract and that an agreement to which a state is a party comes within the protection of the Contract Clause. *See, e.g., Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 4 L. Ed. 629 (1819); *New Jersey v. Wilson*, 11 U.S. (7 Cranch) 164, 3 L. Ed. 303 (1812); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810). The Court established further that "a corporate charter to operate a particular business in a particular manner does not exempt the corporation from the requirement that it obey state legislation touching corporate activities." *Helvering v. Northwest Steel Mills*, 311 U.S. 46, 51, 61 S. Ct. 109, 85 L. Ed. 29 (1940).

Yet the Contract Clause does "impose *some* limits upon the power of a State to abridge existing contractual relationships, even in the exercise of its otherwise legitimate police power." *Allied Structural Steel, supra*, 438 U.S. at 242. As the Court there stated: "Despite the customary deference courts give to state laws directed to social and economic problems, '[l]egislation adjusting the rights and responsibilities of contracting parties must

be upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption.'" 438 U.S. at 244,[4] quoting in part *United States Trust Co., supra*, 431 U.S. at 22.

Where, as here, a contract exists between the State and Good Samaritan, the threshold inquiry is "whether the state law has, in fact, operated as a substantial impairment of a contractual relation." *Energy Reserves Group, supra*, 459 U.S. at ——; *Allied Structural Steel, supra*, 438 U.S. at 244. The severity of the impairment determines whether the action which impairs the contractual obligation has been effected in a constitutional manner. *Allied Structural Steel, supra*, 438 U.S. at 244. Past regulation of the industry is a factor to be considered in assessing the extent of the impairment. *Energy Reserves Group, supra*, 459 U.S. at ——. Our cases have recognized and applied these principles. *Automobile Trade Ass'n v. Ins. Comm'r*, 292 Md. 15, 437 A.2d 199 (1981); *Robert T. Foley Co. v. W.S.S.C.*, 283 Md. 140, 389 A.2d 350 (1978).

The appellants contend that because the podiatry statute does not change or impair any contractual obligation arising out of Good Samaritan's incorporation, the second prong of *Foley* was not satisfied and thus no contract clause violation occurred in this case. We agree. At most, the contract between the State and Good Samaritan involves the hospital's charter and the then existing general corporation law under which the hospital was chartered. *See Dennis v. City of Rockville*, 286 Md. 184, 189-90, 406 A.2d 284 (1979) (statutes in existence at the

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[4] In *United States Trust Co., supra*, the Court held that a state could not retroactively alter a statutory bond covenant relied upon by bond purchasers. In *Allied Structural Steel, supra*, the Court invalidated a state statute requiring an employer that closed its office in the state to pay a "pension funding charge" where its pension fund was insufficient to provide full benefits for all employees having at least 10 years' seniority.

time of making the contract are part of the agreement). Nothing in the provisions of Good Samaritan's charter or in the general corporation law in existence in 1920 purports to inhibit the State from enacting laws impacting upon the hospital's activities or upon the power of the board of trustees to select the hospital's professional staff or to pass or not pass bylaws for the hospital's governance. Thus, no provisions exist in the hospital's contract with the State which would permit Good Samaritan to conduct its activities without regard to the enactment of legislation under the State's police power to protect and promote the general welfare of the people of Maryland. On the contrary, § 48 of Article III of the Constitution of Maryland explicitly provides that corporate charters are "subject to repeal or modification [and] may be altered, from time to time, or be repealed." [5] Moreover, Maryland Code (1975), § 2-103 of the Corporations and Associations Article, dealing with general powers of corporations, authorizes such bodies in subparagraph (15) to adopt, alter and repeal bylaws if "not inconsistent with law or [the corporation's] charter for the regulation and management of [the corporation's] affairs." To the

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[5] Similarly, Maryland Code (1975), § 1-102(e) provides that "[t]he charter of every corporation formed before June 1, 1951, which is subject to repeal or modification, and the charter of every corporation formed under this article is subject to repeal or modification by public general law of the General Assembly."

Of course, these constitutional and statutory provisions do not confer power upon the legislature to deprive the corporation of its property without due process of law or the payment of just compensation. *See* United R. & E. Co. v. M. & C. C. of Balto., 127 Md. 660, 96 A. 880 (1916). Nor do these provisions permit legislation that would destroy or fundamentally change the corporation's purpose. *See* Board of Regents v. Trustees, 206 Md. 559, 112 A.2d 678 (1955); Crisfield v. Public Service Comm., 183 Md. 179, 36 A.2d 705 (1944); Webster v. Cambridge Seminary, 78 Md. 193, 28 A. 25 (1893).

same effect *see* § 2-110(a). These constitutional and statutory provisions are plain manifestations of the well-settled principle that a corporation holds its charter subject to the constitutional exercise of the State's reserved police power to legislate in the public interest. *See, e.g., Insurance Comm'r v. Blue Shield*, 295 Md. 496, 456 A.2d 914 (1983); *Blum v. Engelman*, 190 Md. 109, 57 A.2d 421 (1948).

In determining that Good Samaritan's contract with the State contains no obligation impaired by enactment of the podiatry statute, we have considered Good Samaritan's argument that our decision in *Levin v. Sinai Hosp. of Balto.*, 186 Md. 174, 46 A.2d 298 (1946), vested a right in the hospital as a private entity to manage and control the institution and to select its professional staff. That case involved a suit by a physician excluded from staff privileges in the hospital. We there recognized that "a private hospital has the right to exclude any physician from practicing therein, and such exclusion rests within the sound discretion of the managing authorities." 186 Md. at 179-80. Our holding, however, was qualified by the further statement that a private hospital's freedom to accept some applicants while rejecting others exists only "[i]n the absence of statute." *Id.* at 180. One clear principle to be gleaned from *Levin* is that the hospital's managerial prerogatives in this regard are subject to a proper exercise of the State's police power.

Equally misplaced is the hospital's reliance on *Board of Regents v. Trustees*, 206 Md. 559, 112 A.2d 678 (1955). In that case, a statute transferred the power of management and control from one corporation to another. After recognizing that a charter is a contract between the State and the incorporators, we said that such a transfer, under the circumstances, was arbitrary and unreasonable in that it defeated or fundamentally changed the corporation's purpose and was therefore beyond the reserved power of the legislature under § 48 of Article

III of the Maryland Constitution. In so holding, we said that the character of the alteration is "[t]he nub of the controversy," *id.* at 569, and that the statute, in effect, amounted to "a nullification of the charter, without any justification arising out of the police power." *Id.* at 574.

It is readily apparent that the provisions of the podiatry statute do not defeat or fundamentally change Good Samaritan's corporate purpose to erect and maintain a hospital. As earlier observed, there is simply *no* impairment of any contractual obligation in this case. Indeed, the statutory intrusion into the management authority of the hospital's board is minimal, at best. The statute does not mandate that the hospital provide additional foot care. The hospital retains its authority to determine which, if any, podiatrists it may deem "qualified" for staff privileges. All that the statute requires is a hospital bylaw or regulation permitting use of hospital facilities by and staff privileges for qualified podiatrists. No violation of the Contract Clause is, therefore, involved in this case. *Compare Md. Medical Service v. Carver*, 238 Md. 466, 209 A.2d 582 (1965), and *see Exxon Corp. v. Eagerton*, —— U.S. ——, 103 S. Ct. 2296, 76 L. Ed.2d 497 (1983).

III.

In view of the trial court's disposition of the case on Contract Clause grounds, the substantive due process, equal protection and "special law" contentions raised and presented by Good Samaritan were not decided. Under Maryland Rule 885, we ordinarily will not decide any question not passed upon by the trial court except where necessary or desirable for the guidance of the circuit court or to avoid the expense and delay of another appeal. Since our grant of certiorari encompassed these additional issues, and as they have been briefed and argued by the parties, we shall state our views as to each unresolved question.

(A)

Substantive Due Process and Taking of Property

We find no merit in Good Samaritan's argument that the podiatry statute constitutes an impermissible "taking" of the hospital's incorporeal rights, internal management and property in violation of the due process clauses of the fourteenth amendment and Article 24 of the Maryland Declaration of Rights.[6] It is true, of course, that the State cannot, under the guise of exercising its police power, take private property for public use without payment of just compensation. *Md.-Nat'l Cap. P. & P. Comm'n v. Chadwick*, 286 Md. 1, 405 A.2d 241 (1979). For government restriction upon the use of property to constitute a "taking" in the constitutional sense, so that compensation must be paid, the restriction must be such that it essentially deprives the owner of all beneficial uses of the property. *Governor v. Exxon Corp.*, 279 Md. 410, 436-37, 370 A.2d 1102 (1977), *aff'd* 437 U.S. 117 (1978). In this regard, the restriction imposed must be such that the property cannot be used for any reasonable purpose, and it is not enough to show that the action results in substantial loss or hardship. *Id.* at 437 and cases there cited. Of course, a fair exercise of the police power requires a public purpose and means which bear a real and substantial relation to public health, morals, safety and welfare of the citizens of the State. *Edgewood Nursing Home v. Maxwell*, 282 Md. 422, 384 A.2d 748 (1978); *Bowie Inn v. City of*

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[6] The due process clause of the fourteenth amendment provides: "nor shall any State deprive any person of life, liberty, or property, without due process of law." Article 24 of the Maryland Declaration of Rights provides:

> "That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land."

Bowie, 274 Md. 230, 335 A.2d 679 (1975). We have consistently upheld regulatory statutes which may have, as an incidental effect, the diminution of value of property. *Chadwick*, 286 Md. at 9, and cases there cited. We noted in that case that a regulation which prohibits a beneficial use of private property constitutes a fair exercise of the police power if the public interest generally requires it and the regulation is reasonably necessary to achieve the public goal without being arbitrary, capricious or unduly oppressive. *Id.* at 9. *See also PSC v. Highfield Water Co.*, 293 Md. 1, 441 A.2d 1031 (1982).

As we stated in *Governor v. Exxon Corp.*, *supra*, 279 Md. at 424, the Court's function is very limited when it reviews regulatory legislation alleged to be violative of the due process clauses of the federal and state constitutions. We observed in that case, with abundant citation of authority, that the wisdom or expediency of a law adopted in the exercise of the police power is not subject to judicial review, and such a statute will not be held void if there are any considerations relating to the public welfare by which it can be supported. Moreover, a statute enacted by the legislature in the exercise of the police power is presumed to be valid, so that if any state of facts reasonably can be conceived that would sustain the constitutionality of the statute, the existence of that state of facts as a basis for the passage of the law must be assumed. *Edgewood Nursing Home, supra*, 282 Md. at 427. Therefore, one attacking the statute's validity has the burden of affirmatively and clearly establishing its invalidity. *Salisbury Beauty Schools v. St. Bd.*, 268 Md. 32, 300 A.2d 367 (1973).

The podiatry statute's purpose, plainly evident from its provisions, is to insure that a full range of foot care services offered by qualified podiatrists will be available to the public in hospitals throughout the State. The legislature could have recognized, as the evidence tended to demonstrate in this case, that only a sterile hospital en-

vironment affords adequate health safeguards, at least in some types of podiatric cases. It could have concluded that, absent legislation, hospitals would continue to deny podiatrists access to staff privileges in contravention of the public interest. Or, the legislature could have enacted the podiatry statute to promote economic competition between podiatrists and physicians in order to reduce patient costs. Attributing any one of these reasons to the legislature is plainly sufficient to sustain the statute against the hospital's due process challenge.

Notwithstanding Good Samaritan's protests that the podiatry statute has declared a "forfeiture" of its property and changed the "very nature" of the hospital, we hold that nothing in the statute even remotely resembles a "taking" in the constitutional sense. Quite simply, Good Samaritan has failed affirmatively to prove its substantive due process contentions in this case.

(B)

Equal Protection

Also lacking in merit is Good Samaritan's argument that the podiatry statute constitutes a denial of equal protection under the federal and state constitutions.[7] While recognizing that the legislature has wide power to draw classifications in its statutory enactments, the hospital says that the classification in § 19-351(b) is not rationally related to a legitimate state interest, as required by our cases. Good Samaritan maintains that the podiatry statute is based upon a "misclassification," in

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[7] The equal protection clause of the fourteenth amendment prohibits any state from denying "to any person within its jurisdiction the equal protection of the laws."

The Maryland Constitution does not contain an express equal protection clause; the concept of equal protection is, however, embodied in Article 24 of the Declaration of Rights. *See* Hornbeck v. Somerset Co. Bd. of Educ., 295 Md. 597, 616, 458 A.2d 758 (1983).

that hospitals are required to grant staff privileges only to podiatrists, who are but a subspecialty of health care professionals; that hospitals are not similarly required to grant staff privileges to other medical specialists, such as pediatricians, obstetricians or urologists; that there is no rational basis for compelling hospitals like Good Samaritan, which presently renders a full range of foot care services, to grant staff privileges to qualified podiatrists; and that this is particularly so since podiatrists now enjoy staff privileges at one-fourth of the hospitals in the State and there is no demonstrated need for podiatrists at Good Samaritan or similarly situated hospitals. The hospital urges us to conclude that no justification exists for singling out podiatrists from all other health care specialists for special benefits.

Our cases hold that where all persons who are in like circumstances are treated the same under the law, there is no deprivation of equal protection; but a law which operates upon some persons or corporations, and not upon others like situated or circumstanced, or in the same class, is invalid. *Hornbeck v. Somerset Co. Bd. of Educ.*, 295 Md. 597, 640, 458 A.2d 758 (1983). Where, as here, we are concededly dealing with the rational basis standard of review in determining whether the challenged enactment runs afoul of equal protection guarantees, the basic rules are as stated in *Montgomery Co. v. Fields Road*, 282 Md. 575, 579-80, 386 A.2d 344 (1978), quoting from *Lindsley v. National Carbonic Gas Co.*, 220 U.S. 61, 78-79, 31 S. Ct. 337, 340, 55 L. Ed. 369 (1911):

> " '1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify . . . but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis, and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made

> with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest on any reasonable basis, but is essentially arbitrary.' "

A statutory classification tested by the rational basis standard enjoys a strong presumption of constitutionality and a reasonable doubt as to its constitutionality is sufficient to sustain it. *Hornbeck, supra*, 295 Md. at 656-57.

We have heretofore set forth a number of conceivable rational bases for the legislature's enactment of the podiatry statute. Considering all arguments presented by the hospital, we think it plain that the means chosen in § 19-351(b) are not wholly irrelevant to the achievement of the State's police power objectives in this case.

The fact that § 19-351(b) may benefit podiatrists does not mean that Good Samaritan has been denied equal protection of the law. As we observed in *Cider Barrel Mobile Home v. Eader*, 287 Md. 571, 579-80, 414 A.2d 1246 (1980), "that certain private interests may benefit from the restrictions placed upon the property of others does not establish that those restrictions are not in the public interest." Undoubtedly, a limited number of qualified podiatrists will benefit from hospital access provided by the statute. The legislature could find, however, as it obviously did, that this benefit was outweighed by the benefit to the public resulting from compliance with the provisions of the podiatry statute. Accordingly, we conclude that Good Samaritan did not carry its burden, by a clear and convincing showing, *see Hornbeck, supra*, 295 Md. at 657, that the classification drawn by § 19-351(b) is an arbitrary one, without any conceivable relationship to the public welfare. *See, generally, Attor-*

ney General v. Waldron, 289 Md. 683, 426 A.2d 929 (1981); *Supermarkets Gen. Corp. v. State*, 286 Md. 611, 409 A.2d 250 (1979); *Davidson v. Miller*, 276 Md. 54, 344 A.2d 422 (1975); *Aero Motors v. Adm'r, M. V.A.*, 274 Md. 567, 337 A.2d 685 (1975).

(C)

"Special" Legislation

Finally, we consider whether § 19-351(b) constitutes a "special" law in violation of Article III, § 33 of the Maryland Constitution. As the language of this provision (*supra*, n. 2) makes clear, a statute is only prohibited if it meets two conditions: (1) it must be a "special" law; and (2) there must be no provision for the matter in an existing general law. *Cities Service Co. v. Governor*, 290 Md. 553, 567, 431 A.2d 663, 671 (1981).

We have defined a "special" law prohibited under § 33 as a law for special cases, "one that relates to particular persons or things of a class, as distinguished from a general law which applies to all persons or things of a class," *Prince George's Co. v. B. & O. R. Co.*, 113 Md. 179, 183, 77 A. 433 (1910), quoted in *Cities Service Co.*, *supra*, 290 Md. at 567. This definition, however, does not provide a mechanical rule of thumb for deciding cases, because it depends on what is determined to constitute the "class." *Id.* Consequently, we have looked to the purpose of the constitutional prohibition in applying § 33 to determine whether an enactment affects less than an entire class and, therefore, meets the "special" law requirements. We have said that the purpose of § 33 is to prevent or restrict the legislature from passing private acts for the benefit of particular persons or individual cases. *Potomac Sand & Gravel v. Governor*, 266 Md. 358, 293 A.2d 241, *cert. denied*, 409 U.S. 1040 (1972); *Montague v. State*, 54 Md. 481, 490 (1880). In addition, we have identified various influential considerations and factors,

although no one of them is dispositive in all cases. *See Cities Service Co., supra,* 290 Md. at 569. One such consideration is whether the underlying purpose of the legislation is to benefit or burden a particular class member or members. *Beauchamp v. Somerset County,* 256 Md. 541, 549, 261 A.2d 461 (1970). Another is whether the statute identifies particular individuals or entities. *Reyes v. Prince George's County,* 281 Md. 279, 305, 380 A.2d 12 (1977). It is also pertinent to consider the substance and "practical effect" of a statute and not merely its form. *Beauchamp, supra,* 256 Md. at 549; *Littleton v. Hagerstown,* 150 Md. 163, 132 A. 733 (1926). If the statute serves as a vehicle to confer special advantages on, or to discriminate against, a particular individual or business, this too would be an influential factor. *Littleton, supra,* 150 Md. at 183. Other relevant considerations are the public need and public interest and the adequacy of the general law to serve them. *Jones v. House of Reformation,* 176 Md. 43, 55-58, 3 A. 728 (1939). In addition, in deciding whether a statute applies to an entire class or only to certain members of the class, we have considered whether the lines drawn by the legislature were arbitrary and without any reasonable basis. *Littleton, supra,* 150 Md. at 176.

Good Samaritan argues that § 19-351(b) is a "special" law because it benefits podiatrists, whom it characterizes as particular members of the class of all health care practitioners. It says that no other sub-class of health care professionals has been afforded a statutory right to hospital staff privileges in Maryland. Furthermore, the hospital contends that the statute gives podiatrists an unfair advantage over all other health care professionals who specialize in foot care. It asserts that there is no discernible reasonable basis for the legislatively drawn distinction. And, it argues that there is no public need or public interest adequate to warrant such a legislative mandate.

As already observed, the podiatry statute assures the availability of adequate podiatric services to all hospital patients. It accomplishes its purpose by imposing an equal burden on all hospitals which offer foot care. Correspondingly, the statute benefits all podiatrists equally. To constitute "special" legislation under a § 33 analysis, § 19-351(b) would have to place a disproportionate burden on a single hospital or confer a disproportionate benefit on a single podiatrist. Such is not the podiatry statute's effect. It clearly is not a special law; it does not meet the first condition of § 33 of Article III of the Maryland Constitution. All hospitals offering foot care and all podiatrists are treated alike.

JUDGMENT VACATED; CASE REMANDED FOR ENTRY OF A DECLARATORY JUDGMENT NOT INCONSISTENT WITH THIS OPINION; COSTS TO BE PAID BY APPELLEE.

IN THE CIRCUIT COURT
FOR BALTIMORE CITY
SUPERIOR COURT

No. 23513/1980/1050

THE GOOD SAMARITAN HOSPITAL OF MARYLAND, INC.
v.
STATE OF MARYLAND

and

CHARLES R. BUCK, JR., SECRETARY
MARYLAND DEPARTMENT OF HEALTH
AND MENTAL HYGIENE

and

MARYLAND PODIATRY ASSOCIATION

and

DR. ANTHONY J. COSTA

Amici Curiae:

Baltimore County General Hospital, Inc.
Saint Agnes Hospital of the City of Baltimore
Sacred Heart Hospital of the Sisters of Charity, Inc.
Saint Joseph Hospital, Inc.
Holy Cross Hospital of Silver Spring, Incorporated

Appearances:

John C. Evelius, Esq. and Thomas N. Biddison, Jr., Esq. for The Good Samaritan Hospital

Jack C. Tranter, Esq., Assistant Attorney General for the State of Maryland and Charles R. Buck, Jr., Secretary of the Department of Health and Mental Hygiene

Richard Bloch, Esq. for the Maryland Podiatry Association and Anthony J. Costa, D.P.M.

Charles A. Jednorski, Esq. for Baltimore County General Hospital, Inc.

George T. Tyler, Esq. for Saint Agnes and Sacred Heart Hospitals

Theodore J. Potthast, Jr., Esq. and Theodore C. Mitchell, Esq., for St. Joseph Hospital

Stanley J. Nadonley, Esq. and Gerald J. O'Brien, Esq. for Holy Cross Hospital of Silver Spring, Inc.

MEMORANDUM AND ORDER

The Good Samaritan Hospital of Baltimore, Inc. (Hospital) seeks Declaratory Judgment that Article 43, Section 562(b) of the Annotated Code of Maryland (Now Annotated Code of Maryland; Health-General, Sec. 19-351(b)) be declared unconstitutional, or unconstitutional as applied to the Hospital, under the Constitution of the United States and the Maryland Constitution. Amici Curiae were granted leave to participate only to the extent of filing memoranda.

Section 19-351(b) of the Health-General Article provides:

> (b) Podiatrists.—(1) A hospital or related institution that provides medical or surgical care of the foot, other than incidental care, shall include, in its bylaws, rules, or regulations, provisions for use of facilities by and staff privileges for qualified podiatrists.
>
> (2) The hospital or related institution may restrict use of facilities and staff privileges by podiatrists to those podiatrists who meet the qualifications that the hospital or related institution sets for granting those privileges. (An. Code 1957, art. 43, § 562; 1982, ch. 21, § 2.)

The basic question is whether or not the statute is a valid exercise of the State's police power. The court herein answers this question in the negative and finds the statute to be unconstitutional.

At trial, the Hospital produced three witnesses: Mrs. Patricia J. Smythe, Vice Chairman of the Hospital's Board of Trustees, Robert Parker, M.D., the Hospital's Vice President for Medical Affairs; and Mr. James Oakey, the Hospital's President and Chief Executive Officer. The Hospital also introduced the following documentary evidence:

> *Exhibit #1*—A copy of the original charter of Good Samaritan Hospital, Incorporated.
>
> *Exhibit #2*—A copy of the Last Will and Testament of Thomas O'Neill and First Codicil thereto.
>
> *Exhibit #3*—A copy of a letter dated March 20, 1980 from Richard Bloch, Esquire, with an attached Opinion of the Attorney General.

The State Defendants—the State of Maryland and Charles R. Buck, Secretary—produced no testimony, but introduced the following documentary evidence:

> *Exhibit #1*—The 1982 *Manual* of the Joint Commission on the Accreditation of Hospitals ("JCAH").
>
> *Exhibit #3*—An Affidavit and Certification of F. Carvel Payne, Director, State Department of Legislative Reference, with attachments.

The Non-State Defendants—the Maryland Podiatry Association and Anthony J. Costa, D.P.M.—produced one witness, Michael L. Michetti, D.P.M. and introduced as *Exhibit #2* a copy of a letter dated June 6, 1980 from Anthony J. Costa, D.P.M. to Mr. James Oakey.

The evidence produced established that the Hospital is a private, non-profit community hospital located in Baltimore, Maryland, established and constructed with funds

derived solely from a testimentary bequest by Thomas O'Neill, a Catholic philanthropist. Dr. Robert Parker, who as the Hospital's Vice President for Medical Affairs is responsible for overseeing all professional activities and quality assurance, testified that the Hospital renders medical and surgical care of the foot and that these services are performed by general, vascular and orthopedic surgeons. Dr. Parker noted that there are approximately 375 physicians on the Hospital's staff, approximately 30 of whom specialize in orthopedics. Dr. Parker also testified that the Hospital voluntarily complies with the Guidelines established by the Joint Commission on Accreditation of Hospitals and that if the Hospital were obligated to let podiatrists use its facilities, after a period of initial supervision which the Hospital requires of any physician or dentist who is newly admitted to perform surgery, a podiatrist could perform surgery without direct on-site supervision by a physician, much in the same way dentists on the Hospital's staff now practice, and in the manner described in the JCAH Manual. Dr. Parker stated that the operating rooms at the Hospital are in use full-time and that there is no room for increasing the number of operating rooms. Also the number of operations per day cannot be increased due to lack of bed availability and ancillary personnel in the operating rooms. He testified that there is a constant problem scheduling elective surgery with the result that patients already in the Hospital must be discharged to return at a later date when operating facilities are available.

Additional testimony in support of the Hospital's claims was given by Mrs. Patricia K. Smythe, Vice Chairman of the Hospital's Board of Trustees and Mr. James Oakey, President and Chief Executive Officer of the Hospital. Mrs. Smythe asserted that the statutory requirement that the Hospital permit qualified podiatrists to use its facilities and give such individuals staff privileges interfered with the Board of Trustees' right to man-

age the Hospital's internal affairs and represented an intrusion by the State into the corporate boardroom. Mrs. Smythe testified that the Hospital complied with State statutory and regulatory licensing requirements and the statutory obligation to obtain prior approval of the Hospital's rate structure. She also acknowledged that a management decision to increase the number of beds, change the "mix" of services provided or expend funds above a certain amount for capital equipment could not be made without State approval.

Mr. Oakey testified that there is no need for the Hospital to grant staff privileges to podiatrists and that the Hospital's appointment of the defendant Costa as a consultant provided proper care to out-patients.

Michael L. Michetti, D.P.M., a podiatrist, testified that despite difficulties in obtaining hospital privileges he is now on the staff of several hospitals in the Washington, D.C. area. Speaking as the President of the Maryland Podiatry Association, he described the difficulties that other Association members had in obtaining surgical privileges in Maryland hospitals. He stated that in his opinion podiatric patients benefitted from the performance of certain kinds of surgical procedures in a hospital setting.

The Hospital contends that the podiatrist statute is violative of Article I Section 10 of the United States Constitution which prohibits impairment of contracts. The Maryland Court of Appeals has addressed this question in recent decisions.

> "The Supreme Court has recently made it clear that the Contract Clause does 'impose *some* limits upon the power of a State to abridge existing contractual relationships, even in the exercise of its otherwise legitimate police power.' *Allied Structural Steel Company v. Spannaus*, U.S., 98 S. Ct. 2716, 2721, 57 L.Ed.2d 727 (1978)....

> Consideration of a claim that particular governmental action invalidly impairs contractual obligations involves several steps. *See United States Trust Co. v. New Jersey*, 431 U.S. 1, 17-21, 97 S. Ct. 1505, 52 L.Ed.2d 92 (1977). First, it must be determined whether a contract existed. If that hurdle is successfully cleared by the claimant, a court next must decide whether an obligation under that contract was changed. Finally, if the second question is answered in the affirmative, the issue becomes whether the change unconstitutionally impairs the contract obligation, '[f]or it is not every modification of a contractual promise that impairs the obligation of contract under federal law . . .' *City of El Paso v. Simmons*, 379 U.S. 497, 506-507, 85 S. Ct. 577, 582-583, 13 L.Ed.2d 446 (1965).
>
> Moreover, in performing this analysis, the context in which the Contract Clause claim is made and the various characteristics involved in the particular case, become critically important."

Robert T. Foley Co. et al. v. Washington Suburban Sanitary Commission, 283 Md. 140, 151-2 (1978).

To like effect see *Automobile Trade Association of Maryland, Inc. v. Insurance Commissioner*, 292 Md. 15 (1981).

Applying the *Foley* test, it is conceded that the Hospital's charter constitutes a contract with the State. Whether the statute in issue changes an obligation under that contract is in dispute. The Hospital emphasizes that there is a well recognized distinction between private non-profit hospitals and public hospitals.

> "The essential difference between a public and a private corporation has long been recognized at common law. A public corporation is an instrumentality of the state, founded and owned by the state in the

public interest, supported by public funds, and governed by managers deriving their authority from the state. Public institutions, such as state, county and city hospitals and asylums, are owned by the public and are devoted chiefly to public purposes. On the other hand, a corporation organized by permission of the Legislature, supported largely by voluntary contributions, and managed by officers and directors who are not representatives of the state or any political subdivision, is a private corporation, although engaged in charitable work or performing duties similar to those of public corporations. *Trustees of Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L. Ed. 629, 667; *Regents of University of Maryland v. Williams*, 9 Gill & J. 365, 388, 31 Am. Dec. 72; *Hughes v. Good Samaritan Hospital*, 289 Ky. 123, 158 S. W. 2d 159. So, a hospital, although operated solely for the benefit of the public and not for profit, is nevertheless a private institution if founded and maintained by a private corporation with authority to elect its own officers and directors. *Washingtonian Home of Chicago v. City of Chicago*, 157 Ill. 414, 41 N.E. 893."

Morris B. Levin v. Sinai Hospital of Baltimore City, 186 Md. 174, 178 (1945).

"It is not necessary on this appeal to consider the question of the extent of a physician's constitutional right to practice his profession in a public hospital. The powers and duties of the officers of a public institution are regulated by statute or municipal ordinance. The powers and duties of the officers of a private corporation are regulated by its charter, constitution and by-laws. It is a general rule that a court of equity will not interfere with the internal management of a corporation, unless the act complained of is fraudulent or *ultra vires*. *Williams v. Salisbury Ice Co.*, 176 Md. 13, 26, 3 A. 2d 507;

Murray-Baumgartner Surgical Instrument Co. v. Requardt, 180 Md. 245, 23 A. 2d 697."

Id. at 179.

The Court of Appeals in *Levin* clearly recognizes the basic right of a private hospital to manage its internal affairs with particular reference to selecting its staff. This basic principle was also enunciated in a different context in *Board of Regents of the University of Maryland v. Trustees of the Endowment Fund of the University of Maryland*, 206 Md. 559 (1954), wherein the Court of Appeals considered the right of the Legislature to confer on the Board of Regents the power to control the assets of the Trustees of the Endowment Fund:

> "It has been held that a right of management and control, if not a property right in the usual sense, is one of the incidents of ownership that may survive a transfer of the legal and equitable title. In *Allen v. McKean*, 1 Sumner 276, 305 (1st Cir. 1833), Mr. Justice Story said: 'Nothing is clearer in point of law, than the right of a founder to have his visitatorial power exclusively exercised by the very functionaries, in whom he has vested it. It is the very substratum of his donation. This is not all. The founder has a right to have the statutes of his foundation, as to the powers of the Trustees, strictly adhered to, except so far as he has consented to any alteration of them. But an authority to alter or modify those powers can never be fairly construed into an authority to take them away from his Trustees, and confer the same powers on other persons.' "

Id. at 571.

The State contends that the podiatrist statute is merely a regulation, on the same footing as those which require a hospital to obtain a license to operate (Article 43, § 556, et seq.) and to obtain State approval before increasing the number of beds or make major capital ex-

penditures (Article 41, § 59C, et seq.). The Hospital concedes the validity of these statutes but contends that they are prohibitive in character whereas the podiatrist statute is vastly different in that it affirmatively interferes with the Hospital's internal management by abrogating the Hospital's right to exercise its discretion in the selection of its staff members. The Hospital suggests that if the Legislature can compel it to grant use of its facilities and staff privileges to podiatrists, in the future it may be confronted with similar statutes such as:

> "Any hospital . . . that renders medical or surgical care of the BACK . . . shall include in its by-laws and rules and regulations provisions for use of facilities by and staff privileges for qualified CHIROPRACTORS."
>
> or
>
> "Any hospital . . . that renders medical or surgical care of the BODY shall include in its by-laws and rules and regulations provisions for use and facilities by and staff privileges for qualified surgeons to perform any lawful surgical procedure."

The first example above would force the Hospital to accept non-medical practitioners to treat the back. The second would force upon the Hospital abortion and sterilization operations and procedures which are morally obnoxious to private Catholic hospitals.

This court is persuaded that the second prong of the *Foley* test has been met in that the podiatrist statute materially affect the Hospital's right to manage its affairs.

The final *Foley* test is whether the statute unconstitutionally impairs the contract obligation. Chief Judge Murphy speaking for the Court of Appeals in *Maryland-National Capital Park and Planning Commission v. Chadwick*, 286 Md. 1, at 8 (1979) addressed the basic issue:

"The power of the state over private property extends from the regulation of its use and enjoyment under the police power, to its actual appropriation under the eminent domain power upon payment of just compensation. The distinction between the two governmental powers is an important one because a taking for public use without compensation can be corrected by payment, while a governmental action that violates due process requirements may be invalidated, without regard to whether compensation is provided. Our cases have recognized and applied the distinction between a compensable taking under the eminent domain power and a noncompensable regulation under the police power."

After reference to a myriad of cases, the following appears at p. 11, 12:

"Where the challenged governmental action is not a zoning regulation, the test for determining when a purported 'regulation' becomes a compensable 'taking' is less clear. *See, e.g., Bureau of Mines v. George's Creek, supra* at 177 (The effect of the regulation on the usefulness of the land as a whole may be of such magnitude as to constitute a taking for which just compensation must be paid.); *Leet v. Montgomery County*, 264 Md. 606, 287 A.2d 491 (1972) (Law which required landowner to remove debris dumped on his property by trespassers is a 'taking,' as it forces property owner to use his own resources to confer a benefit upon the public.) *See also Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978) (To determine if regulation constitutes a 'taking,' the proper inquiry is to focus on the uses the regulation permits.); *Smoke Rise, Inc. v. Washington Suburban San. Comm'n*, 400 F. Supp. 1369, 1382 (D. Md. 1975) (*When restrictions are placed on private property in order to create a public benefit rather than to prevent a public harm, a compen-*

sable 'taking' has occurred.) . . . . Part of the confusion surrounding the attempts to distinguish between a compensable 'taking' and a noncompensable 'regulation' stems from Mr. Justice Holmes' statement in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S. Ct. 158, 67 L. Ed. 322 (1922): 'While property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.' "

Emphasis supplied.

Professor Michelman of the Harvard Law School observed:

> "Some of the most thoughtful commentators on our problem have suggested that the way to distinguish between compensable and noncompensable impositions is to ask whether the imposition simply restrains conduct which is harmful to others or whether, on the other hand, it aims at positive enrichment of the public through the extraction of public good from private property. The idea is that compensation is required when the public helps itself to good at private expense, but not when the public simply requires one of its members to stop making a nuisance of himself."

80 Harvard Law Review 1165, 1196 (1967).

This reasoning was applied by the Court of Appeals in *Leet v. Montgomery County*, 264 Md. 606 at 613-15:

> "Furthermore, the pertinent ordinances as applied by the County, and as implemented by the orders of the court below, required the defendant to remove the abandoned vehicles, placed on his property through no fault of his own, at his expense for the benefit of the public. Although such action is not a direct taking of private property by governmental authority for the public good, without compensation, in that there is no physical invasion or legal taking,

nonetheless, the governmental action causes the property owner to spend his resources *pro bono publico.*

In the case before us the property owner relied heavily on *Stevens v. City of Salisbury,* 240 Md. 556, 214 A.2d 775 (1965). . . .

The Court in *Stevens* further observed the distinction between the sources of power from which a government draws its authority to destroy private property rights for the immediate protection of the public, as contrasted with its authority to take private property for the purpose of conferring upon the public some type of benefit of public use. In the first instance the police power of the state is the sustaining source, while in the latter instance it is the right of eminent domain, which latter power when exercised, must be accompanied with just compensation to the property owner as a *quid pro quo.* The Court quoted from *Ackerman v. Port of Seattle,* 348 P. 2d 664, 668 (Wash. 1960) to the effect:

> '* * * When private property rights are actually destroyed through the governmental action, then police power rules are *usually* applicable.* * * *But, when private property rights are taken from the individual and are conferred upon the public for public use, eminent domain principles are applicable.*' 240 Md. at 565.

Actually, in *Stevens,* while the municipality sought to cloak its actions with the mantle of the police power exercised through the means of a zoning ordinance, this Court held that the municipality had penetrated the area of eminent domain and that there was a 'taking' involved which called for compensation to the property owner. In the case at bar it is somewhat more difficult to classify the power under which the County seeks to act. It would have us believe that it is acting solely within the framework of its police power, and we would agree that the power which it seeks to exercise is more germane

> to that power than to the power which is derived from the right of eminent domain. *However, the situation is complicated by the fact that there is no immediate threat to the public health and safety, no nuisance being involved, and that which the County seeks to have the property owner accomplish, at his own expense, while not being 'for public use,' nonetheless is for the benefit of the general public. This latter facet casts a complexion on the matter which places this exercise of power somewhat beyond the conventional concept of the exercise of the police power.*"

Emphasis supplied.

On the issue of what constitutes a taking the State points to the following statement in *Public Service Commission et al. v. Highfield Water Company et al.*, 293 Md. 1, at 13 (1982):

> "This Court has consistently recognized that there is a difference between a governmental exercise of regulatory authority and an exercise of power of eminent domain. While all governmental regulations affecting property restrict the owner's use and enjoyment to some extent, not all such regulations result in a 'taking' in the constitutional sense. Regulations or restrictions that deprive the owner of essentially all beneficial use of the property constitute a 'taking' in the constitutional sense and require the payment of compensation. However, regulations or restrictions that cause a diminuation in value or other hardship, but leave the owner in substantial enjoyment of the property do not constitute a 'taking' and do not require the payment of compensation (citations omitted)."

The above statement is certainly valid when dealing with regulations or restrictions under the police power but *Leet, supra,* makes it clear that when governmental action affirmatively requires a property owner to spend

his resources *pro bono publico* a compensable taking has occurred despite the fact that the property owner is not deprived of substantial enjoyment of his property. This court concludes that the amount of specific dollar loss to the private property owner need not be substantial to constitute a taking in a *pro bono publico* situation. One could speculate that the State under the guise of exercising its police power might impose other affirmative actions on private interests who must be licensed by the State before operating. Suppose that the State required the proprietor of a shoe store, who must obtain a traders license, to include in his stock of merchandise shoes containing arch supports; or a licensed pharmacist to include contraceptive devices in his stock; or a licensed tobacconist to include products containing Maryland tobacco. Resistance to such statutes would certainly not require the tradesmen to demonstrate that compliance would result in significant economic loss.

It is clear that the podiatrist statute is not predicated upon the abatement of a nuisance or an immediate threat to public health and safety. Assuming arguendo that the statute secures a public benefit, a premise which the Hospital vigorously disputes, at the expense of the Hospital, this court concludes that an unconstitutional taking of the use of private property has occurred. The Hospital then has met the three requisites of *Foley* and must prevail. Under the circumstances the court need not address the Hospital's contention that the podiatrist statute is special legislation in violation of Article III § 33 of the Maryland Constitution.

For the above reasons it is this 3rd day of February, 1983, declared that Maryland Code, Health-General, Sec. 19-351(b) is unconstitutional as applied to the Petitioner, the Good Samaritan Hospital of Maryland, Inc.

/s/ J. Harold Grady
J. HAROLD GRADY
Chief Judge

IN THE COURT OF APPEALS OF MARYLAND

September Term, 1983

No. 100

STATE OF MARYLAND, *et al.*,
Appellants

v.

THE GOOD SAMARITAN HOSPITAL OF MARYLAND, INC.,
Appellee

NOTICE OF APPEAL

[Filed Jun. 25, 1984]

PLEASE TAKE NOTICE that The Good Samaritan Hospital of Maryland, Inc., appeals to the United States Supreme Court, pursuant to 28 U.S.C. § 1257(2), from the judgment of the Maryland Court of Appeals entered in this action on April 11, 1984.

Dated: June 25, 1984

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of June, 1984, a copy of the foregoing Notice of Appeal was mailed by first class mail, postage prepaid, to Richard Bloch, attorney for the Maryland Podiatry Association and Anthony J. Costa, and to Stephen H. Sachs, Attorney General, Randall M. Lutz, Assistant Attorney General, and Howard L. Sollins, Assistant Attorney General, attorneys for the State of Maryland and the Secretary of the Maryland Department of Health and Mental Hygiene.

/s/ Charles H. Wilson
CHARLES H. WILSON

Office-Supreme Court, U.S.
FILED
AUG 27 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-43

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THE GOOD SAMARITAN HOSPITAL OF MARYLAND, INC.,
Appellant,

v.

THE STATE OF MARYLAND,
ADELE WILZACK, SECRETARY OF THE MARYLAND
DEPARTMENT OF HEALTH AND MENTAL HYGIENE,
MARYLAND PODIATRY ASSOCIATION,
AND ANTHONY J. COSTA,
Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

MOTION TO DISMISS OR AFFIRM

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The Daily Record Co., Baltimore, MD 21202

BEST AVAILABLE COPY

COUNTERSTATEMENT OF QUESTION PRESENTED

Does § 19-351(b) of the Health-General Article of the Annotated Code of Maryland (which provides that if a hospital elects to offer medical or surgical foot care it must grant podiatrists the privilege to practice in that institution) violate Article I, § 10 of the Constitution of the United States, by impairing unconstitutionally the 1920 corporate charter of The Good Samaritan Hospital of Maryland, Inc., in view of a longstanding and pre-existing power to amend or revoke the charter, reserved to the State under the Constitution of Maryland?

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No. 84-43

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1984

THE GOOD SAMARITAN HOSPITAL
OF MARYLAND, INC.

Appellant

v.

STATE OF MARYLAND,
ADELE WILZACK, SECRETARY OF THE MARYLAND
DEPARTMENT OF HEALTH AND MENTAL HYGIENE,
MARYLAND PODIATRY ASSOCIATION,
AND ANTHONY J. COSTA

Appellees

On Appeal from the Court of Appeals of
Maryland

MOTION TO DISMISS OR AFFIRM

Appellees, the State of Maryland, Adele Wilzack, Secretary of the Maryland Department of Health and Mental Hygiene, the Maryland Podiatry Assoc-

iation and Anthony J. Costa, D.P.M., in accordance with Rule 16, move the Court to dismiss the appeal herein for want of a substantial Federal question or, in the alternative, to affirm the judgment of the Court of Appeals of Maryland because it is manifest that the questions on which the decision of the cause depends are so insubstantial as not to merit plenary review.

COUNTERSTATEMENT OF THE CASE

I.

THE STATUTE INVOLVED

This appeal addresses the validity of § 19-351(b) of the Health-General Article of the Annotated Code of Maryland. Section 19-351(b) was enacted to ensure that any citizen of the State of Maryland requiring medical or surgical foot care in a hospital setting has the

freedom to receive that care from a qualified podiatrist. The statute does not require a hospital to offer any service, including medical or surgical foot care. However, any hospital which chooses to offer medical and surgical foot care is required to amend its rules, regulations and bylaws to grant privileges to qualified podiatrists.[1] If a hospital does elect to offer medical or surgical foot care it need not grant privileges to all licensed podia-

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[1] In contrast to Maryland's less restrictive statute, numerous other jurisdictions have enacted legislation which appears to require all hospitals in these states to extend privileges to qualified podiatrists. E.g., Arizona Rev. Stat. Ann. §36-435 (1983 Supp.); California Health and Safety Code § 1316 (Deering, 1974); Massachusetts Gen. Laws Ann. Ch. 111 §51C (West); N.Y. Public Health Law § 2801-b (Consol. 1977); Ohio Rev. Code Ann. §3701.351 (1982 Supp.) (Page); Oklahoma Stat. Ann. Title 63 §§1-707a and b; Oregon Rev. Stat. §441.063 (West). Appellees' research has revealed no cases in which these enactments were challenged.

trists.[2] Each hospital may set its own standards for granting such privileges.

II.

THE PROCEEDINGS BELOW

The Good Samaritan Hospital of Maryland, Inc. ("Good Samaritan") was granted a charter by the State of Maryland on February 10, 1920, subject to the provisions of the Constitution of Maryland and the State's corporation

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[2] Pursuant to the Maryland Podiatry Act, Health Occupations Article §§ 15-101 to -602, Annotated Code of Maryland, podiatrists are licensed to diagnose or surgically, medically or mechanically treat any ailment of the human foot, subject to certain specific limitations. See Health Occupations Article §15-101(f), Annotated Code of Maryland. Licensed podiatrists must meet stringent educational standards, must pass an examination and must participate in continuing education to maintain competence. See Health Occupations Article §§ 15-302 and 308(d), Annotated Code of Maryland. Additional training is available to podiatrists, which is beyond that required for licensure.

law.[3] The charter itself is silent on the power of the Hospital's Board of Trustees to pass bylaws and to control the selection of medical staff. The purpose of the corporation, stated in the charter, is to erect and maintain a hospital and to receive and administer the funds set aside for this purpose under the Will of Thomas O'Neill. Good Samaritan opened its doors in 1968. The

---

[3] At the time the Good Samaritan charter was granted, the State of Maryland retained an expressly reserved power to alter or revoke the document, pursuant to a longstanding and pre-existing provision of the State Constitution of Maryland. Article III, § 48, Constitution of Maryland. Provisions of this nature were commonly inserted by states into charters, via constitution, statute or express provision, for the purpose of avoiding the effect of the holding in Dartmouth College v. Woodward 17 U.S.(4 Wheat.) 518 (1819). See, Hale, The Supreme Court and the Contract Clause: II, 57 Harv. L. Rev. 621, 637 (1944). See also, Board of Regents v. Trustees, 206 Md. 559, 112 A.2d 678, cert. denied, 350 U.S. 836 (1955); Webster v. Cambridge Female Seminary, 78 Md. 193, 28 A. 25 (1893).

Board of Trustees has elected not to offer certain services, such as obstetrics and pediatrics, and to include other services, such as medical and surgical foot care.

In 1979, the General Assembly of the State of Maryland enacted §19-351(b) of the Health-General Article of the Annotated Code of Maryland.[4] The statute's passage was preceded by a detailed review in various legislative committees, accompanied by expressions of support and opposition by individual podiatrists and physicians, as well as various professional associations.

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[4] House Bill 637 was enacted as Chapter 571, Laws of Maryland 1979. Initially, the statute was codified at Article 43, §562(b), Annotated Code of Maryland. Subsequent to the initiation of the proceedings below, the statute was recodified in its present form without substantive change.

On July 24, 1980, Good Samaritan filed a Petition for Declaratory Judgment in the Superior Court for Baltimore City (the "trial court") alleging, inter alia, that the statute usurped the authority of Good Samaritan to make its own management decisions, that the charter granted the Hospital the right to make such decisions free from State interference and, for that reason, the statute violated Article I, §10 of the Constitution of the United States. Named as respondents were the State of Maryland, the Maryland Department of Health and Mental Hygiene and the Maryland Podiatry Association. Subsequently, Anthony J. Costa, D.P.M. intervened as co-respondent. Dr. Costa has been denied staff privileges at Good Samaritan but is permitted to treat patients in the Hospital's out-patient unit.

Good Samaritan presented three witnesses to show the statute's impact on the Hospital: James Oakey, President and Chief Executive Officer, Robert Parker, M.D., Vice President for Medical Affairs and Patricia K. Smythe, Vice-Chairman of the Board of Trustees. These witnesses contended that compliance with §19-351(b) would have a negative impact on the Hospital in that its resources would be taxed by the additional practitioners. Also, the Hospital's representatives testified that the statute contravenes what it believes to be its right to manage the institution without State interference.

Three hundred seventy-five physicians presently have privileges at Good Samaritan. In addition, an unlimited number of physicians have the option of using the facilities either by obtaining temporary privileges or by co-

admitting a patient with a physician with full privileges.[5] No evidence was submitted to show that Good Samaritan has any plans to curtail the number of physicians with access to the Hospital in view of its allegedly limited resources.

Testimony established that Good Samaritan is affiliated with two medical schools and that research is conducted at the Hospital. However, no witnesses testifying on behalf of Good Samaritan stated that granting privileges to podiatrists would prevent the Hospital from continuing to serve as a teaching or research facility.

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[5] For a full discussion of the distinction between medical staff membership and hospital staff privileges, see Hollowell, The Growing Legal Contest - Hospital Privileges for Podiatrists, 23 St. Louis L.J. 491, 493-94 (1979); see also 65 Official Op. of the Att'y Gen. of Md. 237 (1980).

Testifying in the trial court on behalf of the Appellees was Michael L. Michetti, D.P.M., then President of the Maryland Podiatry Association. Dr. Michetti explained why, for the benefit of the practitioner and the patient, certain podiatric surgical procedures are best performed in a sterile hospital environment where general anesthesia is available. Dr. Michetti testified that he has had privileges at several hospitals for some time but that prior to the enactment of §19-351(b), many podiatrists had faced problems in obtaining hospital privileges.

The evidence demonstrated that, at the time of the statute's enactment, a number of the hospitals in the State of Maryland voluntarily granted privileges to podiatrists. However, the list revealed that all of these thirteen hospitals were located in either Prince

George's County or the Baltimore metropolitan area. Thus, no hospital in Western Maryland or Montgomery County permitted patients to have their inpatient foot surgery performed by a qualified podiatrist.

Claiming reliance upon the rulings of the Court in Allied Structural Steel Co. v. Spannus, 438 U.S. 234, reh'g denied, 439 U.S. 886 (1978) and United States Trust Co. v. New Jersey, 431 U.S. 1, reh'g denied, 431 U.S. 975 (1977), as interpreted by the Maryland Court of Appeals in Robert T. Foley Co. v. WSSC, 283 Md. 140, 389 A.2d 350 (1978), the Honorable J. Harold Grady, then Chief Judge of the Circuit Court for Baltimore City (now retired) held that the statute violated Article I, §10 of the Constitution of the United States by impairing the Good Samaritan charter.

The trial court found that the Good Samaritan charter was a contract which obligated the State never to pass any law which would affect the managerial prerogatives of the Hospital. By requiring Good Samaritan to accept podiatrists if it chose to offer foot care, the trial court found the statute to have impaired the contract because the Hospital's resources would be affected by the additional practitioners. To this end, the trial court held expressly that any statute which causes a person to expend <u>any</u> resources, no matter how few, to comply with a law causes a compensable "taking" under the State's power of eminent domain. (App. 32a-33a).[6] Thus, the trial court found that the impairment caused by the statute was unconstitu-

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[6] "App." refers to the Appendix accompanying Good Samaritan's Jurisdictional Statement.

tional because compliance "took" Good Samaritan's resources and no compensation was paid to the Hospital.[7]

The Court of Appeals of Maryland (the "appellate court") vacated the judgment of the trial court. The appellate court agreed that the Good Samaritan charter constituted a contract between the Hospital and the State. In contrast with the trial court, the appellate court held that the statute did not impair the Hospital's charter because provisions of both the State's general corporation law and the Constitution of Maryland which were in effect at the granting of the charter reserved in the State a power to repeal or modify corporate charters. The appellate court

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[7] It is worthy of note that in its Jurisdictional Statement, Good Samaritan has not continued to urge this unusual theory upon the Court.

sustained the statute as a valid exercise of this expressly reserved power as well as a legitimate manifestation of the State's impliedly reserved police power.

The appellate court also rejected additional arguments raised by Good Samaritan at trial and on appeal, that the statute violates the due process and equal protection guarantees of the Fourteenth Amendment to the Constitution of the United States and Article 24 of the Constitution of Maryland and constitutes a "special law" for the benefit of podiatrists, prohibited by Article III, §33 of the Constitution of Maryland. Rather, the appellate court held that the statute was supported by a rational basis and did not impose a disproportionate burden on any hospital or confer a disproportionate benefit on any single podiatrist.

ARGUMENT

THIS CASE DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION

A substantial federal question is not presented in this case because the decision by the appellate court reflects the application of well-established principles of law, based upon decisions of this Court interpreting the Contract Clause of the Constitution of the United States. The appellate decision below rests upon its finding that the Maryland General Assembly's enactment of § 19-351(b) constitutes another manifestation of the State's inherent police power. The decision merely reaffirms the principle that contracts may not be used as a vehicle for the avoidance of the State's power to enact laws for the public benefit.

Since the decisions of the Court in Allied Structural Steel Co. v.

Spannus, and United States Trust Co. v. New Jersey, some degree of academic interest has been renewed in the use of the Contract Clause as a vehicle for judicial review of legislation which may affect contracts, be they between private parties or between a State and private individuals.[8] In these decisions, the Court outlined a multi-part test for determining when a State law has unconstitutionally impaired a pre-existing contract.

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[8] See Schwartz, Old Wine in Old Bottles? The Renaissance of the Contract Clause, 1979 Sup. Ct. Rev. 95; Comment, Constitutional Law: The Contract Clause - Still a Viable Means to Analyze and Nullify State Legislation, 17 Washburn L.J. 416 (1978); Note, Rediscovering The Contract Clause, 97 Harv. L. Rev. 1414 (1984); Note, A Process-Oriented Approach to the Contract Clause, 89 Yale L.J. 364 (1980); Note, Revival of the Contract Clause: Allied Structural Steel Co. v. Spannus and United States Trust Co. v. New Jersey, 65 Va.L.Rev. 377 (1979).

Where a public contract is at issue, the preliminary inquiry must be whether the state has a reserved power to amend, by virtue of state law or an express provision of the contract. United States Trust Co., 431 U.S. at 23; Phillips Petroleum v. Jenkins, 297 U.S. 629, 634 (1936) ("The reservation of power to amend is a part of the contract between the State and the Corporation and therefore § 10 of Art. I of the Federal Constitution does not apply."); see also B. Wright, The Contract Clause of the Constitution 176-77, 178 n.263 (1938). In the absence of such a reserved power, the first level of inquiry required by the test is:

> Whether the State law has, in fact, operated as a substantial impairment of a contractual relationship. The severity of the impairment measures the height of the hurdle the State legislation must clear.

Allied Structural Steel Co. v. Spannus, 438 U.S. at 244-45. If the State law impairs substantially the contract, the legislation will yet be upheld so long as the impairment is founded upon legitimate conditions which are reasonable given the public purpose justifying the law's adoption. United States Trust Co. v. New Jersey, 431 U.S. at 221; Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400 (1983).

The Court has indicated that a number of factors play an important role in measuring the degree of impairment and the appropriateness of any conditions imposed. See Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 428 (1934). An important consideration is whether the contract impaired by the legislation relates to an industry which has been regulated in the past. Energy Reserves Group, Inc. v. Kansas Power & Light Co.,

459 U.S. at 416; Veix v. Sixth Ward Bldg. & Loan Ass'n., 310 U.S. 32 (1940).

A. The Maryland Court of Appeals Held Correctly That Section 19-351(b) Does Not Impair Any Obligation Created By Good Samaritan's Charter.

All parties are agreed that the charter granted by the State to Good Samaritan constitutes a contract. Dartmouth College v. Woodward, 17 U.S.(4 Wheat.) 518 (1819). However, the charter is silent on the right of the Hospital's Board of Trustees to pass bylaws and control medical staff. The only obligation capable of impairment in the manner suggested by the Hospital is an alleged agreement on the part of the State, arising impliedly from the charter, that the State would never pass any statute affecting the managerial prerogatives of the Good Samaritan Board

of Trustees.[9] Since the charter is silent on this issue, it creates no obligation capable of impairment. Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 420, 546 (1837) ("[I]n grants by the public, nothing passes by implication."); Fertilizing Co. v. Hyde Park,

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[9] Good Samaritan cites Levin v. Sinai Hospital of Baltimore City, 186 Md. 174, 46 A.2d 298 (1946) and Jefferson Parish Hosp. Dist. No. 2 v. Hyde, ___ U.S. ____, 104 S.Ct. 1551 (1984) in support of the view that hospitals possess some inherent right to exclude an entire class of health-care practitioners, in the face of legislation to the contrary. (Jurisdictional Statement pp. 7-8). However, the appellate court expressly rejected any attempt at reliance upon its previous holding in Levin to support this argument. Addressing itself to its earlier decision in Levin, the appellate court held that any rights a hospital may have to accept and reject even individual physicians are subject to the state's police power. So too, Jefferson Parish Hospital recognized the right of a hospital to enter into exclusive contracts with a particular group of specialists. Neither case upheld the right of a hospital to exclude an entire class of health-care practitioners in the face of a police power statute assuring access.

97 U.S. 659, 666 (1978) ("The affirmative must be shown. Silence is negation and doubt is fatal to the claim. This doctrine is vital to the public welfare."). It cannot be presumed or implied that the terms of the charter preclude the legislature from enacting §19-351, in the face of the State's reserved police power.

The only arguable way by which the power to pass bylaws and control medical staff could be said to be a part of the charter is by virtue of the legal principle that all laws in existence at the time of the contract's making are considered to be a part of the agreement,

and were contemplated by the parties.[10] El Paso v. Simmons, 379 U.S. 497, reh'g denied, 380 U.S. 926 (1965); Atlantic Coast Line R.R. Co. v. City of Goldsboro, 232 U.S. 548 (1914); Dennis v. City of Rockville, 286 Md. 184, 189-90, 406 A.2d 284, 287 (1979).

The powers of the Board of Trustees are delineated in Corporations

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[10] Good Samaritan's Charter was accepted by the State in 1920. At the time, Article 23, §10, Maryland Annotated Code of Public General Laws of 1918, provided, in part, as follows:

> The board of directors may exercise all of the powers of the corporation, except such as are by-laws [sic] or by the charter or by the by-laws conferred upon or reserved to the stockholders or members.

Under Article 23, §12, the 1918 Code provided that unless there are no shares of stock outstanding and entitled to vote,

> [t]he power to make, alter and repeal bylaws shall reside in the members or stockholders and not in the directors.

and Associations Article §2-401(b), Annotated Code of Maryland which provides:

> All powers of the corporation may be exercised by or under the authority of the board of directors except as conferred on or reserved to the stockholders by law or by the charter or bylaws of the corporation.

The general powers of the corporation referenced above include, in part, the power to

> [a]dopt, alter, and repeal bylaws not inconsistent with law or its charter for the regulation and management of its affairs.

Corporations and Associations Article §2-103(15), Annotated Code of Maryland (emphasis added). Finally, those bylaws the corporation is empowered to adopt

> may contain any provisions not inconsistent with law or the charter of the corporation for the regulation and management of the affairs of the corporation.

Corporations and Associations Article §2-110(a), Annotated Code of Maryland (emphasis added).

In addition, the Good Samaritan charter, granted in 1920, is subject to previously enacted Article III, §48 of the Constitution of Maryland which provides, in part:

> All charters granted, or adopted in pursuance of this section, and all charters heretofore granted and created, subject to repeal or modification, may be altered, from time to time, or be repealed; . . .

This provision expressly reserved to the State the power to amend charters such as that granted to Good Samaritan.

The appellate court interpreted the above past and present provisions of the Constitution of Maryland and general corporation law of the State, to constitute

> plain manifestations of the well-settled principle

> that a corporation holds its charter subject to the constitutional exercise of the State's reserved police power to legislate in the public interest. (App. 10a).

In the pending action, the appellate court below held correctly that because the Good Samaritan charter contained an expressly reserved power to amend, no obligation of the contract had been impaired. This finding is consistent with the decision of this court in Atlantic Coastline R.R. Co. v. Goldsboro, 232 U.S. 548 (1914). In that case, the Court considered a municipal law which restricted a railroad's use of certain tracks which, over time, had become surrounded by urban development. The Court upheld the legislation under the theory that the police power, impliedly reserved to the State, enabled the city to pass laws to protect the public health, safety, comfort and welfare.

The Court noted that the Supreme Court of North Carolina had upheld the statute as an exercise of the State's express power to alter or repeal corporate charters, which was allegedly reserved in the State's Constitution. While the Court was unable to find the principle referenced in the North Carolina Constitution, it noted: "If the right of repeal was indeed thus reserved, the result is obvious." [citations omitted]. Id. at 556. Whatever the infirmity in the North Carolina Constitution, the general corporation law and Constitution of Maryland are clear in their express reservation of this power. Thus, as the Court noted, the lack of any impairment caused by the statute is obvious.

All parties are presumed to have been aware of the existing State law at the execution of the contract. Under

State law, the charter contained an expressly reserved power in the State to amend or revoke the contract. This must have been a part of the central understanding of the parties to the contract. El Paso v. Simmons, 379 U.S. 497, reh'g denied, 380 U.S. 926 (1965). While it is arguable that some minimal impairment of Good Samaritan's resources may result from its compliance with §19-351(b), there has been no impairment of its contract with the State. Under the formula discussed in United States Trust Co. and Allied Structural Steel, it is only when the contract has been impaired that an assessment of the reasonableness and purpose of the conditions imposed by the legislation need be made.

B. Assuming Arguendo That Section 19-351(b) Impairs Good Samaritan's Charter, the Maryland Court of Appeals Applied The Appropriate Standard of Review.

In its Jurisdictional Statement, Good Samaritan argues that the appellate court is to be faulted for failing to apply "strict judicial scrutiny" to its analysis of the alleged impairment caused by §19-351(b) because the State is a party to the contract. (Jurisdictional Statement p. 9)[11] In United States Trust Co., the Court considered a statutory amendment to a

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[11] Good Samaritan notes that the appellate court inappropriately applied the "rational basis" test in reviewing the statute. While §19-351(b) is supported by a rational basis, the portions of the appellate court's opinion cited by the Hospital relate to its analysis of the due process and equal protection claims raised below. Although the appellate court upheld the statute in the face of these challenges, these issues are not brought before the Court. (Jurisdictional Statement p. 2 n.1).

covenant between the States of New York and New Jersey and certain bondholders who held bonds issued by the Port Authority of New York and New Jersey. The agreement contained no specific reserved power to amend. However, the States relied upon their implicit police power to justify legislation which abrogated express provisions of the bond agreement.

Even assuming that the standard of review applied by the Court in United States Trust Co. is applicable to the present case, Good Samaritan has mischaracterized the relevant test. In Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 83 (1978), the Court noted that it had applied an "intermediate" standard of review in United States Trust Co. In addition, the Court has continued to reject attempts to use the standard articulated in United States Trust Co. to strike down any

statute on the ground that a public contract had been impaired. E.g., Allen v. Board of Adm. Pub. Emp., 34 Cal.3d 114, 665 P.2d 534, 192 Cal. Rptr. 762 (1983), app. dismissed for want of substantial federal question, ___ U.S. ___, 104 S.Ct. 1262 (1984); AFSCME Councils 6, 14, 65 & 96, AFL-CIO v. Sundquist, 338 N.W.2d 560 (Minn. 1983), app. dismissed for want of substantial federal question, ____ U.S. ____, 104 S.Ct. 1092 (1984); Fidelity Union Trust Co. v. New Jersey, 85 N.J 277, 426 A.2d 488, app. dismissed for want of substantial federal question, 454 U.S. 804 (1981); Lyon v. Fourney, 76 Cal. Rptr. 869 (1969), app. dismissed for want of substantial federal question, 396 U.S. 274 (1970). Correspondingly, the federal appellate courts have almost uniformly refused to invalidate statutes on similar grounds. See, e.g., Arceneaux v. Treen, 671 F.2d

128, 135 (5th Cir. 1982); Local Division 589 Amalgamated Transit Union v. Commonwealth of Massachusetts, 666 F.2d 618 (1st Cir. 1981), cert. denied, 457 U.S. 1117 (1982); City of Atlanta v. Metropolitan Atlanta Rapid Transit Authority, 636 F.2d 1084 (5th Cir. 1981); Baker v. Baltimore County, 660 F.2d 488 (4th Cir. 1981), aff'g, 487 F.Supp. 461 (D.Md. 1980); Agustin v. Quern, 611 F.2d 206 (7th Cir. 1979); Jackson Sawmill Co. v. United States, 580 F.2d 302, 312 (8th Cir. 1978), cert. denied, 439 U.S. 1070 (1979); Andre v. Board of Trustees of the Village of Maywood, 561 F.2d 48 (7th Cir. 1977), cert. denied, 434 U.S. 1013 (1978); contra Continental Ill. Natl. Bank & Trust Co. v. State of Washington, 696 F.2d 692 (9th Cir. 1982), app. dismissed sub nom., Don't Bankrupt Washington Committee v. Continental Ill. Natl. Bank & Trust Co., ___ U.S. ___, 103 S.Ct. 1762 (1983).

In so holding, these appellate courts have recognized the distinction between statutes which rest upon the police power of the state, as opposed to those laws which are intended to alter or rescind the State's financial obligations.

While the Court has recognized that the police power of the State cannot be bargained away, States can enter into binding financial obligations, much like individuals.

> The truth is, States and cities, when they borrow money and contract to repay it with interest, are not acting as sovereignties.

United States Trust Co. v. New Jersey, 431 U.S. at 25 n.23, quoting Murray v. Charleston, 96 U.S. 432, 445 (1878); see also Energy Reserves Group, Inc. v. Kansas Power and Light Co., 459 U.S. at 412 n.14. Even a financial obligation

incurred by the State may be impaired by a subsequent State law, so long as the legislation is reasonable and necessary to serve an important public purpose. Id. at 25.

This principle of law is the cornerstone of the State's ability to enact laws for the public benefit.

> The States must possess broad power to adopt general regulatory measures without being concerned that private contracts will be impaired, or even destroyed, as a result. Otherwise, one would be able to obtain immunity from state regulation by making private contractual agreements.

Id. at 22; see also Hudson Water Co. v. McCarter, 209 U.S. 349 (1908); Stone v. Mississippi, 101 U.S. 814 (1880); Beer Co. v. Massachusetts, 97 U.S. 25 (1878) (corporation incorporated under state law reserving the State's right to repeal); Phalen v. Virginia, 49 U.S. (8 How.) 163

(1850) (power to forbid lotteries not surrendered). This reserved police power is an implied condition of every contract. East New York Savings Bank v. Hahn, 326 U.S. 230, 232 (1945).

Good Samaritan's attempt to impose a "strict scrutiny" standard upon the Court's review of §19-351(b) is misplaced because the statute does not affect a financial obligation of the State. Rather, §19-351(b) is a manifestation of the State's power to enact legislation pursuant to its police power.[12] Assuming arguendo that the Good

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[12] It is arguable that even if the State wished to vest Good Samaritan with the right to control its own affairs, to the exclusion of the police power, such a contract would be unenforceable as a matter of law.

> In short, the Contract Clause does not require a State to adhere to a contract that surrenders an essential attribute of its sovereignty.

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Samaritan Charter vested in the Hospital some level of managerial independence, the State cannot be said to have relinquished its police power.

The "heightened" or intermediate scrutiny sought by Good Samaritan is appropriate only when the State enters into a contract in a manner similar to a private individual. The rationale for this approach is clear, since parties who enter into financial contracts with the State should not be subject to a risk that the State may alter or revoke the agreement unreasonably, simply by invoking its sovereign power. This sort of contract was not created when the Good Samaritan charter was granted by the State.

Thus, the Court has stated that where the State is a party to a contract

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United States Trust Co. v. New Jersey, 431 U.S. at 23.

and the "self-interest" of the sovereign is at stake, complete deference to a legislative assessment of reasonableness and necessity is not appropriate. In United States Trust Co., the legislation would have benefited the States directly, since it would have enabled the government to expend additional funds without raising taxes.

Section 19-351(b) confers no such benefit upon the State. Rather, its purpose is to safeguard and enhance the public health. If certain hospitals choosing to offer medical and surgical foot care grant privileges to podiatrists, the citizens of the State will benefit. Thus, the standard of review to be applied is that traditionally appropriate for legislation enacted for the public health, safety and welfare. As the Court has stated:

> As is customary in reviewing economic and social regulation, however, courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure. East New York Savings Bank v. Hahn, 326 U.S. 230 (1945).

United States Trust Co. v. New Jersey, 431 U.S. at 22-23. Section 19-351(b) is precisely the sort of social legislation to which deference must be paid. Thus, it would not have been appropriate for the appellate court to have applied "heightened scrutiny" in its review of any impairment of the charter caused by the legislation.

C. Section 19-351(b) Is Based Upon Reasonable Conditions And Is Of A Character Appropriate To The Public Purpose Justifying Its Adoption.

The appellate court's decision rests primarily upon its holding that §19-351(b) caused no impairment of the Good Samaritan charter. Nevertheless, in

rejecting the Hospital's due process and equal protection claims, the appellate court endorsed the statute as a legitimate and appropriate means of protecting the public's access to a full range of foot care services. (App. 13a). Even if this Court finds it necessary to consider, as a part of its multi-part Contract Clause analysis, the reasonableness of the legislation, there is no question but that §19-351(b) imposes legitimate conditions which are appropriate, given the law's important public purpose.

The Court has departed in two respects from the literal test expressed in United States Trust Co., that any impairment must be based upon "reasonable and necessary" conditions, appropriate to achieve an important public purpose. First, in Energy Reserves Group, Inc., the Court held that legislation impairing a contract will be sustained, so

long as a "significant and legitimate" public purpose is served. 459 U.S. at 416. Second, in Exxon Corp. v. Eagerton, ____ U.S. ____, 103 S.Ct. 2296 (1983), the Court indicated that the "reasonable and necessary" test need be applied strictly, only when the "sole effect" of the statute is to alter contractual obligations. ____ U.S. at ____, 103 S.Ct. at 2306. Thus, in Exxon Corp., the Court upheld a statute which advanced broad societal interests and, for that reason, was "sharply distinguishable" from the legislation stricken in United States Trust Co. Section 19-351(b) satisfies this standard.

Without support, Good Samaritan alleges that the training received by podiatrists is "significantly less extensive" than that received by physicians (Jurisdictional Statement p. 11 n.10), the fact remains that

podiatrists are trained as specialists in the diagnosis and treatment of ailments of the human foot and that they are licensed to render these services in the State of Maryland. Equally undeniable is the fact that, for the benefit of the patient, some conditions should be treated in a hospital. Finally, it is undisputed that some individuals prefer that such treatment be rendered by a podiatrist.

As noted above, the evidence presented to the trial court revealed that, in the absence of §19-351(b), qualified podiatrists were excluded from certain hospitals and entire parts of the State.[13] Thus, prior to the passage of

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[13] For a detailed discussion of the anti-trust implications of exclusionary practices toward podiatrists, see generally, Kissam, Government Policy Towards Medical Accreditation and Certification: The Antitrust Laws and Other Procompetitive Strategies, 1983 Wisconsin

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the statute, patients in these areas were effectively prohibited from having any qualified podiatrist perform necessary foot surgery upon them as an in-patient in a hospital.

As the appellate court stated:

> The podiatry statute's purpose, plainly evident from its provisions, is to insure that a full range of foot care services offered by qualified podiatrists will be available to the public in hospitals throughout the State.

(App. p. 13a). The appellate court went on to anticipate several additional important public purposes the legislation serves, including safeguarding the public

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L.Rev. 1; Kissam, Webber, Bigus and Holzgraefe, Antitrust and Hospital Privileges: Testing The Conventional Wisdom, 70 Calif. L. Rev. 595 (1982); Hollowell, The Growing Legal Contest - Hospital Privileges For Podiatrists, 23 St. Louis L.J. 491 (1979); Note, Health Professionals' Access to Hospitals: A Retrospective and Prospective Analysis, 343 Vanderbilt L.Rev. 1161 (1981).

health, the enhancement of economic competition and the prevention of discrimination.

Good Samaritan makes the argument that §19-351(b) is "special interest" legislation for the benefit of podiatrists seeking greater access to hospital facilities. Yet, at the same time, the Hospital states that the legislation is not necessary because podiatrists had privileges at a sufficient number of hospitals when the law was passed. These inconsistent arguments deny the facts: that podiatrists were able to treat patients at a limited number of hospitals which voluntarily chose to open their doors to them. If competition from podiatrists reached levels which were "unacceptable" to physicians in a particular community, nothing would prevent those doors from swinging shut. The public would be denied both the

economic benefits competition brings, as well as the freedom of choice of health-care practitioner.

Good Samaritan claims that §19-351(b) is the first step in a series of intrusions into the affairs of private corporations. To the contrary, the statute is only a minor example of the State's broad scheme of regulation of hospitals and the health care industry as a whole.[14] Good Samaritan had every

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[14] Maryland is one of only a few states which, through the Health Services Cost Review Commission, regulates all rates hospitals may charge to all payors, such as Medicare, Blue Cross, private insurers and individual self-pay patients. Health-General Article §§ 19-201 to -222, Annotated Code of Maryland. See Health Services Cost Review Comm'n v. Lutheran Hosp., 296 Md. 17, 459 A.2d 192 (1983). Likewise, hospitals may not build, expand or alter services, over certain thresholds, without approval of the Health Resources Planning Commission. Health-General Article §§ 19-101 to -122, Annotated Code of Maryland (1983 Cum. Supp.). Also, the General Assembly has exercised its police power to compel hospitals, public and Cont'd

reason to expect that such regulation would continue throughout the existence of the Hospital.

Not only is §19-351(b) necessary to accomplish the public purpose justifying its adoption, but the conditions it imposes are resonable ones. The legislation represents a legitimate attempt by the State legislature to protect the health and safety of the public. Impairment of the contract, if any, is an incidental by-product of compliance with the statute.

The Hospital is free to choose whether to offer foot care. If the choice is made to offer the service, any

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private, to accept patients for treatment without regard to race, color or national origin. Health-General Article §19-355, Annotated Code of Maryland. See also Health-General Article §19-348, Annotated Code of Maryland (hospital required to test for cervical cancer) and Health-General Article § 19-350, Annotated Code of Maryland (hospital bill required to contain certain itemized information).

podiatrist need not be granted privileges. Rather, the hospital can set its own quality standards in assessing the credentials of those applying. If the Hospital chooses to offer foot care and is faced with overburdened resources, nothing in the statute prevents the Board of Trustees from allocating resources in an efficient manner, so long as podiatrists and physicians are treated equally.

Compliance with § 19-351(b) results in only a minimal impact upon the affairs of Good Samaritan. It is a minor component of an extensive system of health care regulation, adopted pursuant to the State's police power. By any standard of review, it should be sustained as a legitimate exercise of the sovereign right to protect the public health, welfare and safety.

CONCLUSION

In conclusion, Appellees respectfully submit that Good Samaritan's appeal should be dismissed or the judgment of the Maryland Court of Appeals affirmed, because the decision below was correct, the legal principles involved are neither novel nor unsettled and require no further argument and because a substantial federal question is lacking.

Respectfully submitted,

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